Supreme Court, U.S.
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No. 91-2056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BEA JACOBSON, *et al.*,
Petitioners,

v.

CINCINNATI BOARD OF EDUCATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a public school district employ racial classifications to deprive teachers of favorable job assignments in order to maintain a racial quota, in the absence of evidence that such racial classifications are required to remedy past racial discrimination?

2. When racial classifications are implemented in a manner that deprives both African-American and white teachers of favorable job assignments, may a court apply an intermediate level of constitutional scrutiny, rather than the strict constitutional scrutiny mandated by this Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989)?

3. Does a desegregation consent decree provide justification for the racial classification of teachers with respect to job assignments, where the decree was adopted without proof of past racial discrimination by the public school district?

LISTING OF ADDITIONAL PARTIES

Petitioners

LINDA YOUNG, MARTHA RETIC, MARILYN ROSSER, ROSA MONTGOMERY, THIRILEEN KING, BONITA WHITE, and CLARICE CUMMINGS.

Respondents

DR. LEE ETTA POWELL, Superintendent of the Cincinnati City School District.

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THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT THE BOARD'S RACIAL BALANCE POLICY WAS "SPECIFIC RACE NEUTRAL" AND WAS, THEREFORE, SUBJECT TO ONLY AN "INTERMEDIATE LEVEL OF SCRUTINY."

In their *Brief in Opposition to the Petition for a Writ of Certiorari*, Respondents continue to defend the Court of Appeals' refusal to strictly scrutinize the Board's racial balance policy.[1] They base this assertion upon the lower

[1] As noted in the *Petition for a Writ of Certiorari*, the Board's racial balance policy mandated that the racial composition of the

Courts' finding that the policy is "specific race neutral." This assertion is both factually inaccurate and legally irrelevant.

While the policy unquestionably affects both white and African-American teachers, it affects them in different ways. The racial balance policy works to trap African-American teachers in Montessori or other assignments requiring specialized training. On the other hand, the policy has forced the removal of qualified white teachers, from preferred assignments solely due to their race. Indeed, Petitioners Jacobson and Young were involuntarily transferred from assignments in Montessori Schools solely on account of their race. The Board's racial balance policy is not, therefore, "specific race neutral."

The Respondents also claim that a "specific race neutral" classification is not subject to strict scrutiny. Yet this Court has found that *all* racial classifications must be examined with strict scrutiny. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1976) (plurality opinion) ("Racial and ethnic distinctions *of any sort* are inherently suspect and thus call for the most exacting judicial examination") (emphasis added); *Id.* 476 U.S. at 285 (O'Connor, J., concurring) ("This standard reflects the belief, apparently held by all Members of this Court, that racial classifications *of any sort* must be subjected to 'strict scrutiny,' however defined.") (emphasis added). See also *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 721 (1989).

The cases cited by Respondents in support of the Court of Appeals' application of an intermediate level of scrutiny[2] were decided prior to this Court's decisions in

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teaching staff of each school within the Cincinnati Public Schools be within plus or minus five percent of the racial composition of the teaching staff in the district as a whole. As noted in Respondents' *Brief in Opposition*, that policy has been modified but continued.

[2] Appellant cited *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir. 1984); *cert. denied*, 469 U.S. 1107 (1985); *Zaslowsky v. Board of*

Wygant and *City of Richmond*. Accordingly, those cases are of little relevance in the case at bar.

This issue, in and of itself, warrants this Court's consideration: may lower courts refuse to strictly scrutinize a government-imposed racial classification that is alleged to be neutral in its application? Petitioners maintain that this Court should grant the instant petition to review this question, and that the question must be answered in the negative.

II. THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT THE BOARD'S RACIAL BALANCE POLICY SURVIVES CONSTITUTIONAL ANALYSIS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT; THE POLICY IS NEITHER SUPPORTED BY A COMPELLING STATE INTEREST NOR NARROWLY TAILORED TO FURTHER SUCH INTEREST.

Respondents also suggest that the Board's racial balance policy would survive strict scrutiny, as supported by a compelling state interest and narrowly tailored to further that interest. Respondent's argument must fail.

A. The Board's Racial Balance Policy is Not Justified by a Compelling Interest.

Initially, Respondents suggest that their racial balance policy is supported by two state interests which it labels as "compelling." Those asserted interests are: (1) maintaining racial diversity and reducing racial isolation of faculty as part of its efforts to maintain a unitary school system, and (2) providing varied role models for all students within the school district. These interests are

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Educ., 610 F.2d 661 (9th Cir. 1979); *Caulfield v. Board of Educ.*, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); and *Bolin v. San Bernardino City Unified School Dist.*, 155 Cal. App. 3d 759 (1984). The only case cited which was decided after *Wygant* and *City of Richmond* was *Vaughns v. Board of Educ.*, 742 F.Supp. 1275 (D. Md. 1990).

not, however, "compelling," as that term has been defined by this Court.

Racial balance aimed solely at reducing a perceived racial isolation of faculty is simply pursuing racial balance for the sake of racial balance. This Court has consistently rejected the idea that racial balance for its own sake is a compelling interest justfying the establishment and maintenance of a racial classification. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978). Earlier this year, this Court expressly stated that "[r]acial balance is not to be achieved for its own sake." *Freeman v. Pitts*, 112 S.Ct. 1430, 1447 (1992).

Respondents attempt to justify their pursuit of "racial balance" for its own sake by suggesting that it is now part of their effort to remedy the Board's maintenance of a "dual" school system. Respondents have acknowledged, however, that the policy was adopted ten years prior to the court's adoption of the consent decree in *Bronson v. Board of Educ.*, 604 F.Supp. 68 (S.D. Ohio 1984), and shortly after the Sixth Circuit ruled that the Board had not discriminated on the basis of race in faculty hiring or assignments. *Deal v. Cincinnati Bd. of Educ.*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

Furthermore, Respondents have acknowledged that the racial balance policy, although modified, has been continued following the *Bronson* Court's relinquishment of jurisdiction over the provisions of the consent decree dealing with racial balance. Although the district court has necessarily concluded that any 1984 staff racial imbalance has been "remedied," the Board has continued the policy, thereby establishing the Board's purpose as merely pursuing racial balance for its own sake.

Moreover, the "role model" theory again proffered as a compelling interest to justify the racial classification herein was explicitly rejected by this Court in *Wygant*, 476 U.S. at 274-76 (plurality opinion). Accordingly, the

Board's racial balance policy is supported by no "compelling interest."

B. The Board's Racial Balance Policy is Not Narrowly Tailored.

The Board acknowledged in its brief that one of the factors to be considered in determining whether a racial classification is "narrowly tailored" is whether it is limited in duration. Yet its racial balance policy is apparently unlimited in duration. It has been continued despite the *Bronson* Court's relinquishment of jurisdiction over that aspect of the consent decree. With no limit in duration, and indeed an apparent intent to continue the policy long after racial balance has been achieved, the policy cannot be considered "narrowly tailored." See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436 (1976).

III. THE *BRONSON* CONSENT DECREE CANNOT SERVE AS A SHIELD AGAINST JUDICIAL SCRUTINY OF THE BOARD'S RACIAL BALANCE POLICY.

In its *Brief in Opposition to the Petition for a Writ of Certiorari*, the Board has again suggested that its racial balance policy is somehow insulated from review because it was incorporated into a consent decree ten years after its adoption. Once again, however, Respondents' argument must fail.

The racial balance policy was adopted ten years before its inclusion in the *Bronson* consent decree. It has now been continued, albeit in a modified form, following the *Bronson* Court's relinquishment of jurisdiction over that part of the consent decree. It cannot be legitimately argued that the policy is part of some rationale to remedy the Board's operation of a dual school system. Rather, it is a policy designed solely to achieve racial balance without regard to whether the Board is remedying any prior

unlawful conduct. The racial balance policy cannot be insulated from review simply because of its inclusion in the *Bronson* consent decree.

CONCLUSION

For the reasons stated, Petitioners respectfully request this Court to grant the Petition for A Writ of Certiorari, and to reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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